86-729

No. 86

In the Supreme Court of the United States

OCTOBER TERM, 1986

NICODEMUS JOSEPH, Petitioner,

v.

BARBARA ALEXANDER,
WILLIAM ALEXANDER, AND
NICOLE LYNN ALEXANDER, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE OHIO FIFTH DISTRICT COURT OF APPEALS

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I
QUESTIONS PRESENTED

I. Does a state court of appeals deny due process of law under the Fourteenth Amendment by overturning a jury verdict establishing parentage where the verdict is supported by scientific evidence?

II. Did the interpretation given Ohio Revised Code Chapter 3111 by the state court of appeals effectively result in a denial of due process under the Fourteenth Amendment?

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TABLE OF AUTHORITIES

In the

Supreme Court of the United States

OCTOBER TERM, 1986

NICODEMUS JOSEPH, Petitioner,

v.

BARBARA ALEXANDER,
WILLIAM ALEXANDER, AND
NICOLE LYNN ALEXANDER, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE OHIO FIFTH DISTRICT COURT OF APPEALS

The Petitioner, Nicodemus Joseph respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Ohio Court of Appeals for the Fifth Judicial District which was rendered May 5, 1986 and which the Ohio Supreme Court overruled a Motion to Certify the Record and declined to hear August 6, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Judicial District is unreported but is reprinted in the appendix as is the jury verdict and Judgment Entry of the trial court which was overruled by the Fifth District Court of Appeals.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Ohio Court of Appeals for the Fifth Judicial District is invoked under 28 U.S.C. S 1257(1).

STATUTE INVOLVED

Chapter 3111 of the Ohio Revised Code, a copy of which is reprinted in the appendix sets forth the procedure and standards by which paternity is determined where such is a disputed issue.

STATEMENT OF THE CASE

This case has been in continuous litigation since Petitioner filed his initial complaint in the Stark County, Ohio Court of Common Pleas alleging himself to be the natural father of Nicole Lynn Alexander, one of the respondents, and alleging a father daughter relationship with Nicole Lynn Alexander for 17 months following her birth including daily contact between the parties and payment of support by petitioner during that time. Petitioner's claim of paternity has been continuously contested by Respondents William and Barbara Alexander. The Alexanders have two other children living with them, neither of which was fathered by Respondent William Alexander who claims to be the natural father in this case to Respondent Nicole Lynn Alexander.

Petitioner's initial complaint was originally dismissed under Ohio Civil Rule 12(B)(6) as failure to state a claim for which relief could be granted and for containing a prayer that was contrary to public policy, a decision that was upheld by the Ohio Court of Appeals for the Fifth Judicial District. The Ohio Supreme Court reversed in Joseph v. Alexander, (1984) 12 Ohio St. 3d 88 stating that public policy was changed under Chapter 3111 of the Ohio Revised Code so as to permit a party to claim paternity and permit him to attempt to meet his burden of proving paternity under the statute. The case was remanded to the trial court and a jury verdict was rendered declaring Petitioner to be the natural father of Respondent Nicole Lynn Alexander. A key piece of evidence supporting that jury's verdict was a report dated May 7, 1985 from the National Paternity Laboratories, Inc. of Dayton, Ohio reporting test results from blood samples taken from Petitioner and from Respondents Nicole Lynn Alexander and William Alexander. The report concluded that based upon its scientific tests, Respondent William Alexander could not be the natural father of Respondent Nicole Alexander and that there was a 94.07% probability that Petitioner WAS the natural father of Respondent Nicole Lynn Alexander.

Notwithstanding the jury's verdict, the Ohio Court of Appeals for the Fifth Judicial District reversed the jury's verdict and entered final judgment for Respondents on the basis that the evidence showed that Respondents William and Barbara Alexander engaged in sexual relations during the time in question so as to preclude any other evidence of paternity by any other party. The Ohio Supreme Court overruled a Motion to Certify the record of the Court of Appeals refusing to consider the case any further and Petitioner is requesting this Honorable Court to Grant Certiorari to consider the issues presented by this case and the constitutional rights that have been affected by the actions of the Ohio Court of Appeals for the Fifth Judicial District.

REASONS FOR GRANTING THE WRIT

1.

The decision by the Ohio Court of Appeals for the Fifth Judicial District to overturn a jury verdict declaring Petitioner to be the father of Respondent Nicole Alexander violated Petitioner's due process rights under the Fourteenth Amendment.

This Court has recognized that the relationship between parent and child is constitutionally protected. Quilloin v. Walcott, 434 U.S. 246, 255 (1978). The importance and value of this relationship was noted by this Court in Stanley v. Illinois, 405 U.S. 645 (1972) where the Court noted at 651,

> ...The rights to conceive and to raise one's children have been deemed essential (cit. om.) basic civil rights of man (cit. om.) rights far more precious...than property rights.

At the same time, this Court has recognized the value of and importance of blood grouping tests to determine paternity holding in Little v. Streater, 452 U.S. 1 (1981)

that the refusal of the state to pay for such tests for an indigent party constituted a denial of Fourteenth Amendment due process rights.

The Ohio Supreme Court in Joseph v. Alexander, supra declared that Chapter 3111 of the Ohio Revised Code gave Petitioner the right to establish his paternity of Respondent Nicole Alexander under certain specified conditions. Section 3111.09 of the Ohio Revised Code establishes the procedure for and recognition of genetic tests to determine the question of paternity in disputed cases. Petitioner and Respondent William Alexander each claimed to be the natural father of Nicole Alexander. Petitioner and Respondent William Alexander and Respondent Nicole Lynn Alexander each submitted blood samples to the National Paternity Laboratories, Inc. of Dayton, Ohio where a series of tests were run. As a result of those tests, Respondent William Alexander was excluded from further consideration as the natural father of Respondent Nicole Lynn Alexander. At the same time, the test results concluded a 94.07% probability that Petitioner was the natural father of Respondent Nicole Lynn Alexander.

Notwithstanding the basis for the jury's verdict declaring Petitioner to be the natural father of Nicole Alexander, the Ohio Fifth District Court of Appeals reversed the jury's verdict and entered final judgment for Respondents in Joseph v. Alexander, Unreported Case No. CA-6781, May 5, 1986 justifying their action as follows:

> ...The uncontroverted testimony presented to the trial court and jury in the case sub judice was that sexual relations between appellants husband and wife did take place during the time in which the child, Nicole Alexander, must have been conceived.
>
> The 1984 Joseph v. Alexander decision of the Ohio Supreme Court has made it the rule of law that the rebuttal of the presumption of legitimacy of the child can only occur when it can be proved that there was no sexual activity between the husband and wife during the time at which the child was conceived.

> As demonstrated by the record, all the testimony on this particular issue was that appellants husband and wife did engage in sexual activity at that period of time, and not one shred of evidence to rebut that testimony was presented... Id at 5, 6.

Petitioner's Fourteenth Amendment rights to due process of law have been expressly violated by the ruling, interpretation and application of Petitioner's rights under Chapter 3111 of the Ohio Revised Code by the Ohio Fifth District Court of Appeals. The Court of Appeals has ruled that AS A MATTER OF LAW the mere fact that a husband and wife had sexual intercourse during the time in question precludes scientific evidence which precludes and excludes Respondent William Alexander from being the natural father of Respondent Nicole Alexander and establishes a 94.07% probability that Petitioner is the natural father of Nicole. The effective denial of rights established both by legislative enactment and by a decision of the highest court in the State of Ohio can only be deemed a blantent and unjustifiable violation of Petitioner's constitutional rights under the Fourteenth Amendment, a condition that can only be remedied through the granting of Petitioner's Petition for a Writ of Certiorari to the Ohio Fifth District Court of Appeals.

2.

> The interpretation given Chapter 3111 of the Ohio Revised Code by the state appellate court effectively denies Petitioner both due process and equal protection under the Fourteenth Amendment.

In considering the issues presented by this case, the Ohio Fifth District Court of Appeals looked to matters of statutory construction while avoiding the constitutional ramifications of its decision. In so doing, the Court of Appeals looked primarily to the Ohio Supreme Court in its earlier decision in Joseph v. Alexander, supra . In that decision, the Ohio Supreme Court ruled that in its enactment of Chapter 3111 of the Ohio Revised Code, the Ohio General

Assembly also enacted the previous public policy as set forth by the Ohio Supreme Court in State ex rel Walker v. Clark , (1944) 144 Ohio St. 305. It was that decision that established that sexual relations between husband and wife during the period in question precluded any further evidence which might establish paternity on the part of another party. Petitioner claims that such "public policy" not only violates Petitioner's Fourteenth Amendment due process rights, but also that such "public policy" has no rational basis for continuing in the current society of the 1980s as opposed to the society of the 1940s when it was initially conceived.

It must be remembered that in the 1940s the tag of "illegitimate" or its equivocal title of "bastard" had ramifications which no longer exist in a society where such a label has no stigma whatsoever and where such a condition is quite prevalent. A new consideration of finding natural fathers and requiring them to take the responsibility for the support and maintenance of such children as opposed to saddling the taxpayers with that expense has replaced the old consideration of protecting the reputation and legitimazation of such child. Little v. Streater, supra .

In this case, Petitioner sought to accept the responsibility of his paternity of Respondent Nicole Lynn Alexander. Petitioner filed his action under Chapter 3111 of the Ohio Revised Code and the trial court ordered the blood tests set forth in Section 3111.09 of the Ohio Revised Code. There is a uniqueness presented in this case by the fact that Respondent William Alexander was also claiming paternity of Respondent Nicole Alexander.

Throughout the course of its opinion, the Court of Appeals spoke in terms of "husband and wife". Petitioner, not being the husband of Respondent Barbara Alexander, seemed to be fighting a battle that he could not win, no matter what the evidence showed. Throughout its consideration of the case, the Court of Appeals spoke in terms of "husband and wife" and "presumption of legitimacy" as if such considerations far outweighed the scientific test results which established conclusively that Respondent William Alexander was not the father of Respondent Nicole Alexander while

Petitioner had a 94.07% probability of being the natural father of Respondent Nicole Alexander.

Petitioner submits that the Ohio Fifth District Court of Appeals' interpretation of Chapter 3111 of the Ohio Revised Code not only was patently biased against him in violation of his Fourteenth Amendment due process rights, but that its reliance upon State ex rel Walker public policy established in the 1940s has no rational relation to the scientific advancements in genetics which are used on a regular basis in the 1980s as recognized by this Court in Little v. Streater, supra. nor does such statement of public policy reflect the changes in society of the 1980s as compared with the society in the 1940s such that there is no justification for the denial of Petitioner's due process rights.

At the same time, the decision by the Ohio Fifth District Court of Appeals establishes a suspect class of persons whose sexual partners have relations with more than one party as opposed to persons whose sexual partners limit themselves to one party not their spouse. Therefore, a question of a violation of the equal protection clause of the Fourteenth Amendment arises. In Trimble v. Gordon , 430 U.S. 762 (1977) this Court ruled that a statute which permitted illegitimate children to inherit from their mothers, but not from their natural fathers was unconstitutional as a violation of the equal protection clause of the Fourteenth Amendment. Likewise in Gomez v. Perez , 409 U.S. 535 (1973) a Texas law permitting enforcement of child support laws to legitimate children but denying same to illegitimate children was held to violate the equal protection clause of the Fourteenth Amendment. In this case, Petitioner is denied equal protection under the Fourteenth Amendment where he is impaired from claiming paternity merely because the woman in question had sexual relations with another man notwithstanding conclusive evidence that such additional sexual relations had no bearing on the child that was conceived, nor would such fact have any bearing on society's acceptance or rejection of that child.

Petitioner states that his only remedy for the protection of

his due process and equal protection rights under the Fourteenth Amendment is the granting of his Petition for Writ of Certiorari to the Ohio Fifth District Court of Appeals.

3.

Public policy regarding paternity requires encouragement of actions to establish paternity and support and create rights on behalf of the child such that denial of such rights by a state appellate court violate both the due process and equal protection clauses of the Fourteenth Amendment.

This Court could take judicial notice of the uniqueness of this action in that here is someone who is filing an action to be declared the father as opposed to the general case where a man is fighting a paternity action. Petitioner has fought for four years to be declared the natural father of Respondent Nicole Alexander. Petitioner has gone twice to the highest court of the State of Ohio and has been awarded a jury verdict in his favor only to have his rights wrongfully taken away from him. Such responsibility and responsible behavior should be rewarded and encouraged, not punished and discouraged as society more and more takes the burden for the support and maintenance of children born out of wedlock.

At the same time, consideration should not only be given from the perspective of Petitioner as natural father, some consideration should come from the perspective of the rights of Respondent Nicole Lynn Alexander as the child of Petitioner if such has been proven as this case demonstrates. There are rights of inheritence as well as considerations of genetic makeup and medical histories which could have practical implications for Respondent Nicole Lynn Alexander throughout her life. These considerations were totally ignored by the Ohio Fifth District Court of Appeals whose considerations were limited to maintaining the facade of "husband and wife" which was popular in the 1940s and which has little bearing to society of the 1980s. Limitation of

EDITOR'S NOTE

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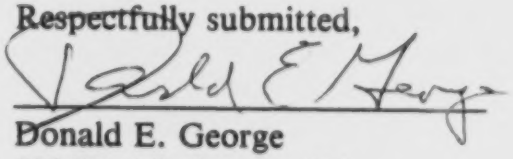
consideration can only be deemed a violation of the due process and equal protection rights of both Petitioner and Respondent Nicole Lynn Alexander whose remedy lies in the granting of the Petitioner's Petition for Writ of Certiorari to the Ohio Fifth District Court of Appeals.

CONCLUSION

For the reasons set forth in this Petition a Writ of Certiorari should issue to review the judgment and opinion of the Ohio Fifth District Court of Appeals.

Respectfully submitted,



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572 W. Market St. #11
Akron, Ohio 44303
Attorney for Petitioner

IN THE COURT OF APPEALS FOR
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NICODEMUS JOSEPH,	:	
Plaintiff-Appellee	:	
-vs-:		JUDGMENT ENTRY
BARBARA ALEXANDER, et al.,	:	
Defendants-Appellants	:	CASE NO. CA-6781

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas, Family Court Division, of Stark County, Ohio, is reversed and a final judgment for defendants-appellants is hereby entered.

JUDGES

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NICODEMUS JOSEPH,	:	JUDGES:
Plaintiff-Appellee	:	Hon. Norman J.
-vs-	:	Putman, P.J.
BARBARA ALEXANDER, et al.	:	Hon. John R.
Defendants-Appellants	:	Hoffman, J.
		Hon. Ira G. Turpin, J.
		Case No. CA-6781
		OPINION

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas Case No. J50222
JUDGMENT:	REVERSED and FINAL JUDGMENT ENTERED
DATE OF JUDGMENT ENTRY:	

APPEARANCES:

For Plaintiff-Appellee	For Defendants-Appellants
DAVID A. Van GASBEEK 522 Citizens Savings Bldg. Canton, Ohio 44702	JAMES P. ADLON 401 Central Trust Tower Canton, Ohio 44702
	PATRICK MENICOS 552 Citizens Savings Bldg. Canton, Ohio 44702

Stark County, Case No. CA-6781

HOFFMAN, J.

This matter comes before the court upon the joint notice of appeal filed by defendants-appellants, Barbara Alexander, William Alexander, and Nicole Alexander, and by Patrick Menicos, guardian ad litem for Nicole Alexander (Appellants) from the judgment of the Stark County Court of Common Pleas, Family Court Division, filed September 30, 1985.

The action was tried to a jury upon the complaint of the plaintiff-appellee, Nicodemus Joseph (Appellee) filed under Chapter 3111 of the Ohio Revised Code, the Uniform Parentage Act.

At the conclusion of the jury trial, the jury rendered a verdict in favor of Appellee, finding him to be the father of Nicole Alexander.

In his complaint, Appellee requested that the court determine and declare him to be the natural father of appellant Nicole Alexander; to declare appellant Barbara Alexander to be the natural mother of Nicole Alexander; to declare appellant William Alexander not to be the natural father of Nicole Alexander, and to reflect said declarations of parentage upon the birth certificate of Nicole Alexander.

At the conclusion of the jury trial, the jury rendered a verdict in favor of Appellee Nicodemus Joseph, finding him to be the father of Nicole Alexander.

It is from this judgment that Appellants have timely filed this notice of appeal and raise the following two assignments of error.

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO ADHERE TO THE SYLLABUS OF THE SUPREME COURT OF OHIO IN THE CASE OF JOSEPH v. ALEXANDER, 12

OHIO ST. 3D 88 (1984) AS THE LAW OF OHIO TO BE APPLIED IN THE CASE, IN THAT THE TRIAL COURT:

A. REFUSED TO SUBMIT A SPECIFIC INTERROGATORY TO THE JURY AS TO WHETHER THE PLAINTIFF HAD PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT WILLIAM ALEXANDER AND BARBARA ALEXANDER HAD NOT ENGAGED IN SEXUAL RELATIONS AT THE TIME THAT NICOLE ALEXANDER MUST HAVE BEEN CONCEIVED: AND,

B. REFUSED TO INSTRUCT THE JURY THAT THE BURDEN WAS UPON THE PLAINTIFF TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT WILLIAM ALEXANDER AND BARBARA ALEXANDER HAD NOT ENGAGED IN SEXUAL RELATIONS AT THE TIME THAT NICOLE ALEXANDER MUST HAVE BEEN CONCEIVED: AND,

C. REFUSED TO LIMINE TESTIMONY AND EVIDENCE AT TRIAL OF BLOOD TESTING RESULTS UNTIL THE PLAINTIFF HAD PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT WILLIAM ALEXANDER AND BARBARA ALEXANDER HAD NOT ENGAGED IN SEXUAL RELATIONS AT THE TIME THAT NICOLE ALEXANDER MUST HAVE BEEN CONCEIVED.

ASSIGNMENT OF ERROR NO. II

THE JUDGMENT RENDERED IN THIS CAUSE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND UNSUPPORTED BY THE EVIDENCE.

The record discloses that appellee Nicodemus Joseph alleged that he is the natural father of appellant Nicole Alexander who was born on October 8, 1977, and that appellant Barbara Alexander is the natural mother of Nicole Alexander.

Barbara Alexander testified that her last menstrual period prior to the birth of Nicole Alexander took place in late December of 1976 or early January of 1977, and that Nicole Alexander was conceived in early January of 1977.

Barbara Alexander further testified that in December of 1976 and January of 1977, she was engaging in sexual relations with appellee Nicodemus Joseph one time per week. Barbara Alexander further testified that at the time that Nicole Alexander was conceived she was married to appellant William Alexander and resided with him and their two children.

Barbara Alexander further testified that her husband William Alexander was unaware of her sexual relationship with appellee Nicodemus Joseph.

Barbara Alexander testified that during December of 1976 and January of 1977, she was engaging in sexual relations with her husband William Alexander on a weekly basis.

William Alexander testified that during the month of December, 1976, and January and February of 1977, he was engaging in sexual relations on a weekly basis with his wife, Barbara Alexander.

Appellee Nicodemus Joseph testified that he did not know whether William Alexander and Barbara Alexander were sleeping together and engaging in sexual relations at the time Nicole Alexander was conceived.

We now turn to the two assignments of error raised by Appellants.

II

We address Appellants' second assignment of error first for the reason that said assignment of error is well taken and is sustained upon the authority and rule of law laid down by the Ohio Supreme Court in Joseph v. Alexander (1984), 12

Ohio St. 3d 88, which is dipositive of the case sub judice and for which Appellants are entitled to final judgment in their favor as a matter of law.

> While every child conceived in lawful wedlock is presumed legitimate, such presumption is not conclusive and may be rebutted by clear and convincing evidence that there were no sexual relations between husband and wife during the time in which the child must have been conceived.
>
> Syllabus, Joseph, cited above.

The uncontroverted testimony presented to the trial court and jury in the case sub judice was that sexual relations between appellants husband and wife did take place during the time in which the child, Nicole Alexander, must have been conceived.

The 1984 Joseph v. Alexander decision of the Ohio Supreme Court has made it the rule of law that the rebuttal of the presumption of legitimacy of the child can only occur when it can be proved that there was no sexual activity between the husband and wife during the time at which the child was conceived.

As demonstrated by the record, all the testimony on this particular issue was that appellants husband and wife did engage in sexual activity during that period of time, and not one shred of evidence to rebut that testimony was presented.

This court notes that counsel for appellants did properly move the trial court for a directed verdict at the close of plaintiff's case (T.366-338) and again at the close of all the evidence, (T.397-398) citing the law set down in Joseph v. Alexander , and was overruled by the trial court.

This assignment of error is sustained.

I

Although we have already ruled that Appellants are entitled to a final judgment as a matter of law upon their second

assignment of error, we do address their first assignment of error in compliance with App. R. 12(A) of the Ohio Rules of Appellate Procedure, and for the further reason that had not the uncontroverted evidence of the sexual activity between the husband and wife precluded the need for said issue to arise, we find it well taken.

The syllabus of the Ohio Supreme Court in Joseph v. Alexander, infra , delineates what specific set of facts must be established by clear and convincing evidence in order to rebut the presumption of legitimacy.

Had there been disputed evidence in this case (although there was not) as to the sexual relations between this husband and wife during the time at which the child must have been conceived, Appellants' timely request for a special instruction and interrogatories to the jury as to whether the plaintiff had proved by clear and convincing evidence that the husband and wife had not engaged in sexual relations at the time Nicole Alexander must have been conceived was proper and in denying the proposed jury instruction, the trial court committed reversible error where the record clearly reveals that the court's general charge to the jury failed to set forth the law applicable to the case.

As in Cleveland Electric Illuminating Co. v. Astorhurst Land Co. (1985), 18 Ohio St.3d 268, Appellee argues that specific jury instructions are no longer required to be given by a trial court in that Civ. R. 51(A) has abolished such instructions, and that the law applicable to the case is to be set forth by the trial court in its general charge to the jury.

However, Justice Holmes in writing the decision for the court in that case states:

> It is this court's belief that the function of the trial court's general charge to the jury is the same now as it was prior to the enactment of the Civil Rules, i.e., to state clearly and concisely the principles of law necessary to enable the jury to accomplish the purpose desired. See Pickering v. Cirell (1955), 163 Ohio St.1, 4.
>
> At page 272

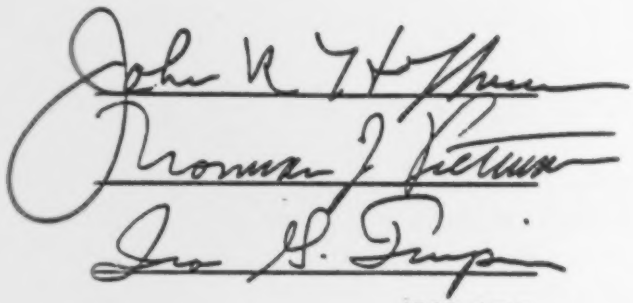
We find from the record before us that the trial court's general charge to the jury did not state clearly and concisely the principle of law necessary to enable the jury to accomplish the purpose desired.

This assignment of error is sustained.

For the reasons stated above, we sustain both assignments of error raised by Appellants and reversed the judgment of the Court of Common Pleas, Family Court Division, of Stark County, Ohio, and enter final judgment for Appellants.

Putman, P.J. and
Turpin, J. concur.

JRH/emc



JUDGES

Appendix C

JOSEPH, APPELLANT, v. ALEXANDER ET AL., APPELLEES.

[Cite as Joseph v. Alexander (1984), 12 Ohio St. 3d 88.]

Paternity—Evidence—Presumption of legitimacy of child conceived in lawful wedlock may be rebutted, how.

(). Jur 3d Family Law//256, 259, 273.

While every child conceived in lawful wedlock is presumed legitimate, such presumption is not conclusive and may be rebutted by clear and convincing evidence that there were no sexual relations between husband and wife during the time in which the child must have been conceived.

(No. 83-1464—Decided July 11, 1984.)

APPEAL from the Court of Appeals for Stark County.

The plaintiff-appellant, Nicodemus Joseph, commenced this action on June 29, 1982 when he filed a complaint alleging that he was the natural father of Nicole Lynn Alexander, who had been born while Barbara Alexander and William Alexander were married.

The complaint went on to allege that Joseph and Mrs. Alexander "had an adulterous sexual affair which lasted from October 20, 1974, until April 18, 1979." It was further alleged that Joseph and Mrs. Alexander decided to have "a common love child" and that as a result of sexual relations during January 1977, Nicole Lynn Alexander was born on October 8, 1977. Allegedly, the foregoing was all with the knowledge, consent and approval of William Alexander.

The complaint also alleged that since the birth of Nicole, the Alexanders had represented to Joseph that he was the

father, had allowed regular visitation, had "accepted several thousand dollars" for support and maintenance of the child, and had permitted the creation of an "emotional father-child relationship." The relationship was disrupted on April 18, 1979 by the Alexanders. The prayer requested the court to declare that the plaintiff was the natural father of Nicole.

Prior to trial, but after a hearing, the court dismissed the complaint. As reason therefor, the court ruled that the complaint failed to state a claim and further that the prayer was contrary to public policy. Upon appeal a majority of the court of appeals affirmed.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Mr. David A. Van Gaasbeek, for appellant.

Mr. Harry W. Schmuck and Mr. James P. Adlon, for appellees.

O'NEILL, J. The appellant originated his action as one allowed under R.C. Chapter 3111. This chapter provides that an action may be brought for the determination of the existence or non-existence of the father and child relationship. R.C. 3111.04 specifically provides, in part, that such an action may be brought by "***a man alleged or alleging himself to be the child's father***." The court of appeals concluded that such an action could not be brought and involve a child conceived and born during the existence of a marriage. The court stated that "***[r]easonable minds cannot differ that this posture is so contrary to public policy as to be ludicrous."

Prior to the adoption of present R.C. Chapter 3111, commonly known as the Uniform Parentage Act, effective June 29, 1982, the public policy relative to a matter such as the one at hand had been established by this court. In *State, ex rel. Walker,* v. *Clark* (1944), 144 Ohio St. 305 [29 O.O.450], it was stated at 312:

"Taking into account the weight of authority and the present-day methods of disproving paternity, the rule in Ohio should be that while every child conceived in lawful wedlock is presumed legitimate, such presumption is not conclusive and may be rebutted by clear and convincing evidence that there were no sexual relations between husband and wife during the time in which the child must have been conceived."

Thus, the law was settled and courts were bound to adhere to and follow that decision. It was the established public policy.

When the legislature enacted sweeping changes in R.C. Chapter 3111, it patently adopted the case law of *State, ex rel. Walker,* v. *Clark, supra,* as statutory law. This legislation, not being in conflict with any constitutional provision, establishes the applicable rule of public policy. The courts are bound. The rule is very concisely stated in *Probasco* v. *Raine* (1893), 50 Ohio St. 378, at 390-391, which states:

"***[I]t is clear that in this state the validity of an act passed by the legislature must be tested alone by the constitution, and that the courts have no right or power to nullify a statute upon the ground that it is against natural justice or public policy."

As a further reason for dismissal, the trial court and the court of appeals ruled that the "operati[ve] facts" alleged in the complaint failed to state a claim upon which relief could be granted under R.C. Chapter 3111. The operative facts which must be alleged in an action of this nature are set forth in R.C. 3111.04(A), which reads, in pertinent part, as follows:

"An action to determine the existence***of the father and child relationship may be brought by***a man alleged or alleging himself to be the child's father***."

In his complaint, appellant advanced allegations of the relationship of natural father and child. He was required to do no more.

The dismissal of this case was an abuse of discretion. We reverse the judgment of the court of appeals and remand the cause to the trial court for further proceedings according to law.

Judgment reversed and cause remanded.

CELEBREZZE, C.J., SWEENEY, LOCHER, HOLMES, C. BROWN and J.P. CELEBREZZE, JJ., concur.

O'NEILL, J., of the Seventh Appellate District, sitting for W. BROWN, J.

Appendix E

FILED

IN THE COURT OF COMMON PLEAS

FAMILY COURT DIVISION

STARK COUNTY, OHIO

NICODEMUS JOSEPH	:	CASE NO. J50222
Plaintiff	:	JUDGE RUZZO
-VS-	:	
BARBARA ALEXANDER, et. al.:		JUDGMENT ENTRY
Defendants	:	

This action came on for trial to a jury from August 19, 1985, to August 22, 1985, and the issues having been presented to a jury and the jury having rendered its verdict,

It is hereby Ordered, Adjudged, and Decreed that the Plaintiff be declared the father of the child, Nicole Lynn Alexander, and that the Defendant, William Alexander, be declared not to be the father of Nicole Lynn Alexander.

It is further Ordered, Adjudged, and Decreed that the Defendants, Barbara Alexander and William Alexander, pay all costs for the blood tests, expert fees, guardian fees, and court costs.

It is further Ordered, Adjudged, and Decreed that the issues of child support, visitation, and custody be continued until further order of the court.

Judge Edward Ruzzo

Approved by:

David A. Van Gaasbeek
Attorney for Plaintiff

James Adlon
Attorney for Defendants, Barbara Alexander and William Alexander

Patrick Henicoe, Guardian Ad Litem of the Defendant, Nicole Lynn Alexander

Appendix D

FILED

IN THE COURT OF COMMON PLEAS

FAMILY COURT DIVISION

STARK COUNTY, OHIO

NICODEMUS JOSEPH	:	CASE NO. J50222
Plaintiff	:	
-vs-	:	
BARBARA ALEXANDER, et. al.:		Jury Verdict in
Defendants	:	Paternity

We, the Jury, being duly impaneled and sworn, find that the Plaintiff, Nicodemus Joseph is_____the father of the child as alleged in the complaint.

And we do so render our verdict upon the concurrence of 8 members of our said Jury, that being three-fourths or more of our number. Each of us said jurors concurring in said verdict signs his/her name hereto the 22nd day of August 19 85.

Edward C. Klug — Paul H. Hawken

W. Jr. D. McFadden — Fred A. Manning

Diana Smith — Francis J. Kuck, Jr.

Virginia M. Fitzpatrick — Frederick R. Godin

The Supreme Court of Ohio

Columbus

1986 TERM

To wit: August 6, 1986

NICODEMUS JOSEPH : CASE NO. 86-892

Appellant, :

-vs- :

BARBARA ALEXANDER, et. al.: ENTRY

Appellee. :

Upon consideration of the motion for an order directing the Court of Appeals for Stark County to certify its record it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $20.00, paid by David Van Gaasbeek.

Frank D. Celebrezze

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date_____.

JAMES WM. KELLY CLERK

Daniel J. Crowley DEPUTY

PRELIMINARY PROVISIONS

3111.01 Definition

(A) As used in this chapter, "parent and child relationship" means the legal relationship that exists between a child and the child's natural or adoptive parents and upon which this chapter and any other provision of the Revised Code confers or imposes rights, privileges, duties, and obligations. The "parent and child relationship" includes the mother and child relationship and the father and child relationship.

(B) The parent and child relationship extends equally to all children and all parents, regardless of the marital status of the parents.

3111.02 Parent and child relationship; how established

The parent and child relationship between a child and the child's natural mother may be established by proof of her having given birth to the child or pursuant to this chapter. The parent and child relationship between a child and the natural father of the child may be established pursuant to this chapter. The parent and child relationship between a child and the adoptive parent of the child may be established by proof of adoption or pursuant to Chapter 3107. of the Revised Code.

3111.03 Presumptions as to father and child relationship

(A) A man is presumed to be the natural father of a child under any of the following circumstances:

(1) The man and the child's mother are or have been married to each other, and the child is born during the marriage or is born within three hundred days after the marriage is terminated by death, annulment, divorce, or dissolution or after the man and the child's mother separate pursuant to a separation agreement.

(2) The man and the child's mother attempted, before the child's birth, to marry each other by a marriage that was

solemnized in apparent compliance with the law of the state in which the marriage took place, the marriage is or could be declared invalid, and either of the following apply:

(a) The marriage can only be declared invalid by a court and the child is born during the marriage or within three hundred days after the termination of the marriage by death, annulment, divorce, or dissolution;

(b) The attempted marriage is invalid without a court order and the child is born within three hundred days after the termination of cohabitation.

(3) The man and the child's mother, after the child's birth, married or attempted to marry each other by a marriage solemnized in apparent compliance with the law of the state in which the marriage took place, and any of the following occur:

(a) The man has acknowledged his paternity of the child in a writing sworn to before a notary public;

(b) The man, with his consent, is named as the child's father on the child's birth certificate;

(c) The man is required to support the child be a written voluntary promise or by a court order.

(4) The man, with his consent, signs the child's birth certificate as a informant as provided in section 3705.14 of the Revised Code.

(B) A presumption arises under division (A)(3) of this section regardless of the validity or invalidity of the marriage of the parents. A presumption that arises under this section can only be rebutted by clear and convincing evidence. If two or more conflicting presumptions arise under this section, the court shall determine, based upon logic and policy considerations, which presumption controls.

PRACTICE AND PROCEDURE

3111.04 Action to determine father and child relationship

(A) An action to determine the existence or nonexistence of the father and child relationship may be brought by the child or the child's personal representative, the child's

mother or personal representative, a man alleged or alleging himself to be the child's father, or the alleged father's personal representative.

(B) An agreement does not bar an action under this section.

(C) If an action under this section is brought before the birth of the child and if the action is contested, all proceedings, except service of process and the taking of depositions to perpetuate testimony, may be stayed until after the birth.

3111.05 Limitation of action

An action to determine the existence or nonexistence of the father and child relationship may not be brought later than five years after the child reaches the age of eighteen. Neither section 3111.04 of the Revised Code nor this section extends the time within which a right of inheritance or a right to a succession may be asserted beyond the time provided by Chapter 2105., 2107., 2113., 2117., or 2123. of the Revised Code.

3111.06 Jurisdiction

(A) The juvenile court has original jurisdiction of any action authorized under this chapter. An action may be brought under this chapter in the juvenile court of the county in which the child, the child's mother, or the alleged father resides or is found or, if the alleged father is deceased, of the county in which proceedings for the probate of his estate have been or can be commenced, or of the county in which the child is being provided support by the department of welfare of that county. If an action for divorce, dissolution, or alimony has been filed in a court of common pleas, that court of common pleas has original jurisdiction to determine if the parent and child relationship exists between one or both of the parties and any child alleged or presumed to be the child of one or both of the parties.

(B) A person who has sexual intercourse in this state sub-

mits to the jurisdiction of the courts of this state as to an action brought under this chapter with respect to a child who may have been conceived by that act of intercourse. In addition to any other method provided by the Rules of Civil Procedure, personal jurisdiction may be acquired by personal service of summons outside this state or by certified mail with proof of actual receipt.

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3111.07 Necessary parties; intervenors

(A) The natural mother, each man presumed to be the father under section 3111.02 of the Revised Code, and each man alleged to be the natural father, shall be made parties to the action or, if not subject to the jurisdiction of the court, shall be given notice of the action pursuant to the Rules of Civil Procedure and shall be given an opportunity to be heard. The court may align the parties. The child shall be made a party to the action unless a party shows good cause for not doing so. Separate counsel shall be appointed for the child if the court finds that the child's interests conflict with those of the mother.

(B) If an action is brought pursuant to this chapter and the child to whom the action pertains is or was being provided support by the department of public welfare, a county department of welfare, or another public agency, the department, county department, or agency may intervene for purposes of collecting or recovering the support.

3111.08 Procedure

(A) An action brought pursuant to this chapter to declare the existence or nonexistence of the father and child relationship is a civil action and shall be governed by the Civil Rules unless a different procedure is specifically provided by this chapter.

(B) If an action is brought against a person to declare the existence or nonexistence of the father and child relationship between that person and a child and the person in his answer

admits the existence or nonexistence of the father and child relationship as alleged in the action, the court shall enter judgment in accordance with section 3111.13 of the Revised Code. If the person against whom the action is brought does not admit the existence or non-existence of the father and child relationship, the court may order genetic tests to be taken in accordance with section 3111.09 of the Revised Code. If the person against whom the action is brought does not appear personally or by counsel at a pretrial hearing scheduled under section 3111.11 of the Revised Code, the opposing party may file a written motion for default judgment against the person. The motion, along with a notice of the date and time when it is to be heard, shall be served upon the person in the same manner as is provided for service of a complaint under the Civil Rules. The court may render a judgment by default against the person after hearing satisfactory evidence of the truth of the statements in the complaint.

3111.09 Genetic tests

(A) In any action instituted under this chapter, the court may, upon its own motion or upon the motion of any party to the action that is made at a time so as not to unduly delay the proceedings, order the child's mother, the child, the alleged father, and any other person who is a defendant in the action to submit to genetic tests. Any fees charged for the tests shall be paid by the party that requests them unless the court orders the fees taxed as costs in the action. If the court orders the fees taxed as costs in the action, if the custodian of the child is represented by the agency that is designated in the county to provide enforcement of child support orders under Title IV-D of the "Social Security Act," 49 Stat. 629 (1935), 42 U.S.C. 301, as amended, if the custodian is a recipient of aid to federally dependent children payments for the benefit of the child, and if the defendant in the action is found to be indigent, then the designated child support enforcement agency is authorized, within guidelines contained in federal law, to pass through all costs of the tests. Any costs passed

through in such a manner are in addition to any amount provided for under any contractual provision for specific funding allocations for the agency between the county, the state, and the federal government.

(B) The genetic tests shall be made by qualified examiners who are appointed by the court. The examiners may be called as witnesses to testify as to their findings. Any party may demand that other qualified examiners perform independent genetic tests under order of the court. The number and qualifications of the independent examiners shall be determined by the court.

(C) Nothing in this section prevents any party to the action from producing other expert evidence on the issue covered by this section, but, if other expert witnesses are called by a party to the action, the fees of these expert witnesses shall be paid by the party calling the witnesses and only ordinary witness fees for these expert witnesses shall be taxed as costs in the action.

(D) If the court finds that the conclusions of all the examiners are that the alleged father is not the father of the child, the court shall enter judgment that the alleged father is not the father of the child. If the examiners disagree in their findings or conclusions, the court or jury shall determine the father of the child based upon all the evidence.

(E) As used in this chapter, "genetic tests" means a series of serological tests, that are either immunological or biochemical or both immunological and biochemical in nature, and that are specifically selected because of their known genetic transmittance. "Genetic tests" include, but are not limited to, tests for the presence or absence of the common blood group antigens, the red blood cell antigens, human lymphocyte antigens, serum enzymes, and serum proteins.

3111.10 Admissible evidence

In an action brought under this chapter, evidence relating to paternity may exclude:

(A) Evidence of sexual intercourse between the mother

and alleged father at any possible time of conception;

(B) An expert's opinion concerning the statistical probability of the alleged father's paternity, which opinion is based upon the duration of the mother's pregnancy;

(C) Genetic test results, weighted in accordance with evidence, if available, of the statistical probability of the alleged father's paternity;

(D) Medical evidence relating to the alleged father's paternity of the child based on tests performed by experts. If a man has been identified as a possible father of the child, the court may, and upon the request of a party shall, require the child, the mother, and the man to submit to appropriate tests. Any fees charged for the tests shall be paid by the party that requests them unless the court orders the fees taxed as costs in the action.

(E) All other evidence relevant to the issue of paternity of the child.

3111.11 Pretrial procedures

If the person against whom an action is brought pursuant to this chapter does not admit in his answer the existence or nonexistence of the father and child relationship, the court shall hold a pretrial hearing, in accordance with the Civil Rules, at a time set by the court. At the pretrial hearing, the court shall notify each party to the action that the party may file a motion requesting the court to order the child's mother, the alleged father, and any other person who is a defendant in the action to submit to genetic tests and, if applicable, to the appropriate tests referred to in section 3111.10 of the Revised Code. When the court determines that all pretrial matters have been completed, the action shall be set for trial.

3111.12 Testimony; jury trial

(A) In an action under this chapter, the mother of the child and the alleged father are competent to testify and may be compelled to testify by subpoena. If a witness refuses to testify upon the ground that his testimony or evidence might tend to incriminate him and the court compels the witness to testify, the court may grant the witness immunity from having his testimony used against him in subsequent criminal proceedings.

(B) Testimony of a physician concerning the medical circumstances of the mother's pregnancy and the condition and characteristics of the child upon birth is not privileged.

(C) Testimony relating to sexual access to the mother by a man at a time other than the probable time of conception of the child is inadmissible in evidence, unless offered by the mother.

(D) Any party to an action brought pursuant to this chapter may demand a jury trial by filing the demand within three days after the action is set for trial. If a jury demand is not filed within the three-day period, the trial shall be by the court.

If the action is tried to a jury, the verdict of the jury is limited only to the parentage of the child, and all other matters involved in the action shall be determined by the court following the rendering of the verdict.

3111.13 Effects of judgment; supplemental release

(A) The judgment or order of the court determining the existence of nonexistence of the parent and child relationship is determinative for all purposes.

(B) If the judgment or order of the court is at variance with the child's birth certificate, the court may order that a new birth certificate be issued under section 3111.18 of the Revised Code.

(C) The judgment or order may contain any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child. The judgment or order shall direct the father to pay all or any part of the reasonable expenses of the mother's pregnancy and confinement. After entry of the judgment or order, the father may petition for custody of the child or for visitation rights in a proceeding separate from any action to establish paternity.

(D) Support judgments or orders ordinarily shall be for periodic payments that may vary in amount. In the best interest of the child, a lump sum payment or the purchase of an annuity may be ordered in lieu of periodic payments of support.

(E) In determining the amount to be paid by a parent for support of the child and the period during which the duty of support is owed, a court enforcing the obligation of support shall base the judgment or order of support upon the financial status of the parents and the father's ability to pay support, and shall consider all relevant facts, including, but not limited to all of the following:

(1) The needs of the child;

(2) The standard of living and circumstances of the parents;

(3) The relative financial means of the parents;

(4) The earning ability of the parents;

(5) The need and capacity of the child for education;

(6) The age of the child;

(7) The financial resources and the earning ability of the child;

(8) The responsibility of the parents for the support of others;

(9) The value of services contributed by the custodial parent.

3111.14 Fees for experts; court costs

The court may order reasonable fees for experts, and other costs of the action and pretrial proceedings, including genetic tests, to be paid by the parties in proportions and at times determined by the court. The court may order the proportion of any party to be paid by the court, and, before or after payment by any party or the county, may order all or part of the fees and costs to be taxed as costs in the action.

3111.15 Enforcement of support order

(A) If the existence of the father and child relationship is declared or if paternity or a duty of support has been adjudicated under this chapter or under prior law, the obligation of the father may be enforced in the same or other proceedings by the mother, the child, or the public authority that has furnished or may furnish the reasonable expenses of pregnancy, confinement, education, support, or funeral, or by any other person, including a private agency, to the extent that any of them may furnish, has furnished, or is furnishing these expenses.

(B) The court may order support payments to be made to the mother, the clerk of the court, or a person or agency designated to administer them for the benefit of the child under the supervision of the court.

(C) Willful failure to obey the judgment or order of the court is a civil contempt of the court.

3111.16 Continuing jurisdiction

The court has continuing jurisdiction to modify or revoke a judgment or order issued under this chapter to provide for future education and support and a judgment or order issued with respect to matters listed in divisions (C) and (D) of section 3111.13 and division (B) of section 3111.15 of the revised Code, except that a court entering a judgment or order for the payment of a lump sum or the purchase of an annuity under division (D) of section 3111.13 of the Revised Code may specify that the judgment or order may not be modified or revoked.

GENERAL PROVISIONS

3111.17 Action to determine mother and child relationship

Any interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this chapter that are applicable to the father and child relationship shall apply to an action brought under this section.

3111.18 New birth certificate

Upon the order of a court of this state or upon the request of a court of another state, the department of health shall prepare a new certificate of birth consistent with the findings of the court and shall substitute the new certificate for the original certificate of birth.

3111.19 Compromise agreement; approval by court

After an action has been brought and before judgment, the alleged father and the mother may, subject to the approval of the court, compromise the action by an agreement in which the parent and child relationship is not determined but in which a specific economic obligation is undertaken by the alleged parent in favor of the child. In reviewing the obligation undertaken by the alleged parent, the court shall consider the interest of the child, the factors set forth in division (E) of section 3111.13 of the Revised Code, and the probability of establishing the existence of a parent and child relationship in a trial.

3111.20 to 3111.24 Order of attachment; service; sale of attached property—Repealed

npl National Paternity Laboratories, Inc.

May 7, 1975
Jim Adlon
Attorney at Law
401 Central Trust Tower
Canton, OH 44702

Dear Attorney Adlon:

On April 9, 1985 blood specimens were received from the Belden Village Laboratory on Nicodemus L. Joseph (alleged father #1), William A. Alexander (alleged father #2), Barbara J. Alexander (presumed mother) and Nicole L. Alexander (child) for the purpose of paternity exclusion studies. Completed identification forms of all parties are in our files.

HLA testing was performed and the results are shown below:

	HLA Phenotype	Most Probable HLA Genotype
Nicodemus L. Joseph (alleged father #1)	HLA-A1,A2;B17,By	A1,B17/A2,By
William A. Alexander (alleged father #2)	HLA-A3,A24;B14,Bw62	Not Known
Barbara J. Alexander (presumed mother)	HLA-A2,A24;B7,Bw62	A24,B7/A2,Bw62
Nicole L. Alexander (child)	HLA-A2,A24;B7,By	A24,B7/A2,By

Interpretation:

The most probable HLA genotype of the mother and child is based on the assumption that Barbara J. Alexander is the biological mother of Nicole L. Alexander. As can be seen from the results, the mother and child share the A24,B7 complex. The A2,By complex of the child must be donated

by the biological father. William A. Alexander (alleged father #2) is not able to donate this genetic material. The HLA data listed above indicates that William A. Alexander (alleged father #2) can be excluded as the father of Nicole L. Alexander.

The HLA data listed above indicates that Nicodemus L. Joseph (alleged father #1) cannot be excluded as a possible father of Nicole L. Alexander.

Red Cell testing was performed and the results are shown below:

	ABO	D	C	E	c	e	D^U	M	N	S	s	K	Fy^a	Fy^b	Jk^a
Nicodemus L. Joseph (alleged father #1)	O	+	+	O	+	+	NT	O	+	O	+	O	+	+	+
Barbara J. Alexander (presumed mother)	O	+	+	+	+	+	NT	+	O	+	O	O	O	+	+
Nicole L. Alexander (child)	O	+	O	+	+	+	NT	+	+	+	+	O	O	+	+

Interpretation:

The Red Cell data listed above indicates that Nicodemus L. Joseph cannot be excluded as a possible father of Nicole L. Alexander.

Utilizing the HLA and Red Cell data, two calculations have been performed to determine the liklihood of paternity for Nicodemus L. Joseph (alleged father #1). The first calculation is the Probability of Paternity which compares the chances that a single sperm carrying all the necessary genes could be produced by the alleged father in contrast to the frequency in which such a sperm might be produced by a random man. This is expressed as the percentage certainty. 100% would be equivalent to proof of paternity, 0% would be equivalent to non-paternity. A value of 50% would mean that the alleged father and the random man have an equal chance of being the biological father. In this case, the Probability of Paternity is 94.07%.

The next calculation, the Paternity Index, is a means of expressing the likelihood of paternity as a ratio. In this case, the Paternity Index is 16 to 1.

The likelihood of paternity based on the calculations according to verbal predicates assigned by Hummel is considered likely.

Sincerely,

Randall A. Smith, Ph.D.
Laboratory Director

RAS/cd

cc: Ray Lenhart
Dave Van Gaasbeck

Sworn to and Subscribed
before me this 7th day of
May 1986, at Dayton, Ohio

Cheryl L. Dunaway, Notary Public
In and for the State of Ohio
My Commission Expires October 26, 1988

86-729

No. ~~86-892~~

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NICODEMUS JOSEPH,

Petitioner,

v.

BARBARA ALEXANDER,
WILLIAM ALEXANDER, and
NICOLE LYNN ALEXANDER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE OHIO FIFTH DISTRICT COURT OF APPEALS

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STATEMENT OF THE CASE

The Respondents, Barbara Alexander and William Alexander, were lawfully married in 1968. They have remained lawfully married continuously to the present day. The Respondents have three minor children born issue of their marriage, one of whom, Nicole Lynn Alexander was born on October 8, 1977.

At the time that Nicole Lynn Alexander was conceived, the Petitioner, Nicodemus Joseph was an ordained Serbian Orthodox priest. Barbara Alexander had been consulting with the priest as a marriage counselor, and the priest entered into a seduction of Barbara Alexander, without the knowledge of her husband William Alexander.

After the birth of Nicole Lynn Alexander, the Petitioner filed a complaint seeking to be declared the natural father of Nicole Lynn Alexander and joined as party defendants, Nicole Lynn Alexander, William Alexander, and Barbara Alexander.

The defendants denied the allegations of the Petitioner. The complaint was dismissed for failure to state a claim upon which relief could be granted, a decision which was affirmed by the Ohio Court of Appeals for the Fifth Judicial District.

The Ohio Supreme Court reversed in *Joseph v. Alexander,* 12 Ohio St. 3d 88 (1984) and in its first syllabus to the opinion therein, stated the controlling law of the State of Ohio as follows:

> While every child conceived in lawful wedlock is presumed legitimate, such presumption is not conclusive and may be rebutted by clear and convincing evidence that there was no

> sexual relations between husband and wife during the time in which the child must have been conceived.

Upon remand from the Supreme Court of Ohio, the respondents propounded to the trial court that the first syllabus of the Supreme Court of Ohio from *Joseph v. Alexander*, 12 Ohio St. 3d 88 (1984) was the controlling law of the case to be applied by the trial court.

The trial court refused to instruct the jury in accordance with this statement of the law of Ohio, and the jury returned a verdict in favor of the Petitioner.

The evidence at trial was undisputed that Barbara Alexander was engaging in sexual relations with William Alexander during the time in which Nicole Lynn Alexander was conceived.

Upon appeal by the Respondents herein, the Ohio Court of Appeals for the Fifth Judicial District reversed and entered final judgment for the Respondents, specifically finding that the Petitioner had not offered one shred of evidence to rebut that testimony which was presented as to the sexual relations between Barbara and William Alexander during the time of conception.

REASON FOR DENYING THE WRIT

1. The decision by the Ohio Court of Appeals for the Fifth Judicial District reversing the jury verdict in favor of the Petitioner did not violate Petitioner's due process rights under the Fourteenth Amendment.

The first syllabus of the opinion of the Supreme Court of Ohio in *Joseph v. Alexander, Supra* established the controlling law of the State of Ohio for the

determination of parentage where a child is born to a woman who is lawfully married at the time of conception.

That syllabus which reflects the public policy of the State of Ohio is as follows:

> While every child conceived in lawful wedlock is presumed legitimate, such presumption is not conclusive and may be rebutted by clear and convincing evidence that there were no sexual relations between husband and wife during the time in which the child must have been conceived.

Joseph v. Alexander, Supra

No appeal was taken by the Petitioner herein to a higher Court from the judgment of the Ohio Supreme Court in *Joseph v. Alexander,* 12 Ohio St. 3d 88 (1984).

Petitioner has contended that the judgment of the Ohio Fifth District Court of Appeals in *Joseph v. Alexander,* unreported Case No. CA-6782 (May 5, 1986) which applied the syllabus of the Ohio Supreme Court in *Joseph v. Alexander,* 12 Ohio St. 3d 88 (1984) as the controlling rule of law to the evidence in the record at trial has violated Petitioner's due process rights under the Fourteenth Amendment.

The Petitioner's claim of violation of his due process rights is not supported by judgment of the Ohio Supreme Court in *Joseph v. Alexander, Supra* wherein the Ohio Supreme Court expressly stated in its first syllabus that the presumption of legitimacy was *not* conclusive and *could* be rebutted by clear and convincing evidence that the husband and wife had no sexual relations during the time of conception.

Further, the results of the HLA and Blood Grouping Tests were admitted into evidence.

Under the unique facts and circumstances of this case, the Petitioner, who had a full and ample opportunity to do so, offered not a shred of evidence to rebut the testimony of the Respondents that they were engaging in sexual relations during the time in which the child was conceived.

It is fundamental that in order to confer jurisdiction upon the United States Supreme Court to review a State Court's decision, that the Federal question has been properly raised and passed upon by the highest court of that state. *Home Insurance Co. v. Dick,* 281 U.S. 397; *Whitfield v. Ohio,* 297 U.S. 431.

The Petitioner did not raise the issue of denial of due process before the Ohio Court of Appeals, Fifth Appellate District in *Joseph v. Alexander,* Unreported Case No. CA-6781 (May 5, 1986) and only put forth in his Memorandum in Support of Jurisdiction to the Ohio Supreme Court the proposition of law that the judgment of the Ohio Court of Appeals, Fifth Appellate District established an irrebutable presumption that violates the due process clause of the Fourteenth Amendment.

The Petitioner's due process violation which he propounds in his petition for a Writ of Certiorari was not raised before nor passed upon by the highest court of the State of Ohio.

2. The interpretation given to Chapter 3111 of the Ohio Revised Code by the State of Appellate Court does not deny Petitioner due process and equal protection under the Fourteenth Amendment.

Petitioner did not raise by Assignment of Error in the Ohio Court of Appeals, Fifth District; at trial; nor

by Memorandum in Support of Jurisdiction in the Ohio Supreme Court the issue of denial of equal protection under the Fourteenth Amendment, nor was that issue passed upon by the highest Court of the State of Ohio.

The State of Ohio has the reserve power to establish public policy in the area of family relationships.

As the Supreme Court of the United States has stated in Justice Stewart's concurring opinion in the case of *Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. 816 (1977)

> We have little doubt that the due process clause would be offended if a State were to attempt to force the breakup of a natural family over the objections of the parents and their children without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.

The decision of the Supreme Court of Ohio in *Joseph v. Alexander,* 12 Ohio St. 3d 88 (1984) from which no appeal was taken represents the public policy of the State of Ohio that the interests of the nuclear family, the child, and the individual be balanced.

The State Supreme Court has that right, and in enunciating that public policy has given the Petitioner the notice, opportunity for a hearing, and opportunity to meet his burden of proof which due process under the Fourteenth Amendment entails.

3. Public Policy of the State of Ohio regarding the parentage of children was not violated by the judgment of the State Appellate Court.

The child, Nicole Lynn Alexander, was represented throughout all State Court proceedings by a Guardian Ad Litem, Attorney Patrick Menicos, who was appointed by the trial court.

There is no evidence in the record to establish that Nicole Lynn Alexander was not responsibly and financially supported by the Respondents.

The record also establishes that the Guardian Ad Litem joined as an appellant to appeal from the judgment of the trial court to the Ohio Court of Appeals, Fifth District.

This action arises from a unique set of facts and circumstances and must be examined in light of the same.

CONCLUSION

For the reason set forth in this Brief in Opposition to the Petition for a Writ of Certiorari to the Ohio Fifth District Court of Appeals, the Respondents; William Alexander; Barbara Alexander; and Nicole Lynn Alexander, by Patrick Menicos, Guardian Ad Litem for Nicole Lynn Alexander request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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(216) 456-8376

Attorney for Respondents